

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

CHARLES B. MARTIN,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

(CSA 2 921 997)

DOCKET NUMBER  
PH831M8910547

DATE: JUN 19 1991

Charles B. Martin, Portsmouth, Virginia, pro se.

Reginald M. Jones, Jr., Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The Office of Personnel Management (OPM) has petitioned for review of the initial decision that reversed the reconsideration decision in which OPM determined that the appellant received an overpayment of his civil service annuity benefits and was not entitled to a waiver of the overpayment. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and AFFIRM OPM's reconsideration decision.

### BACKGROUND

The appellant appealed an OPM reconsideration decision that determined he was overpaid \$7,086.00 in annuity benefits and was not eligible for a waiver based on his financial assets in excess of \$160,000.00. OPM proposed a collection schedule of 72 monthly installments of \$98.00 and one installment of \$30.00. See Initial Appeal File (IAF), Tab 4, Subtab 2. In his petition for appeal, the appellant asserted that, if his installment payments exceeded \$25.00 a month, he would suffer financial hardship. See IAF, Tab 1. He also claimed that a complete waiver of the overpayment is required by "equity and fairness." See IAF, Tab 8.

In the initial decision, the administrative judge found that: (1) Although a considerable amount of the appellant's approximately \$160,000.00 in assets appeared to be liquid assets, he had cancer and must keep substantial liquid assets to provide for a medical emergency; (2) he had consumer debts of \$78,506.83; and (3) a waiver of the overpayment was appropriate due to his cancer and liabilities. See IAF, Tab 9.

OPM has petitioned for review of the initial decision. See Petition for Review File (PRF), Tab 1.

### ANALYSIS

We grant OPM's petition for review to consider the evidence of record under our decision in *Fusco v. Office of Personnel Management*, 42 M.S.P.R. 501 (1989), which was unavailable to the parties and the administrative judge before

the close of the record below. In *Fusco*, the Board noted that recovery of an annuity overpayment "may not be made from an individual when, in the judgment of the Office of Personnel Management, the individual is without fault and recovery would be against equity and good conscience." *Id.* at 505; 5 U.S.C. § 8346(b). Recovery is against equity and good conscience when it would cause financial hardship to the debtor; and financial hardship exists where the annuitant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. See 5 C.F.R. §§ 831.1403 and 831.1404; *Fusco*, 42 M.S.P.R. at 505.

In order to determine whether recovery of an overpayment would cause the annuitant financial hardship, it is proper to consider changes to the annuitant's income for the collection period, as well as anticipated expenses for the period. See *Fusco*, 42 M.S.P.R. at 506. The appellant stated in his Financial Resources Questionnaire (FRQ) that his medical condition since his operation for cancer required that he keep his investment portfolio "on standby" in case of a medical emergency. See IAP, Tab 4, Subtab 3. The administrative judge considered the possibility of a medical emergency as a significant factor in waiving the appellant's overpayment. See Initial Decision at 6-7. However, the mere possibility of a future medical emergency does not affect the appellant's present ability to pay, and any future effects may be addressed by a mid-collection request to OPM for lower

payments, compromise, suspension, or write-off, as provided for by OPM's *Policy Guidelines on the Disposition of Civil Service Retirement Overpayments (Policy Guidelines)* § I.D.12. at 10, IAF, Tab 4, Subtab 6; see *Lopez v. Office of Personnel Management*, 47 M.S.P.R. 186, 191-92 (1991).

Additionally, monthly income and monthly expenses are compared throughout the period during which collection is scheduled to be made. See *Fusco*, 42 M.S.P.R. at 508. In his FRQ, the appellant claimed a monthly income of \$2,545.38. He listed his monthly expenses as \$2,517.00. See IAF, Tab 4, Subtab 3. Because OPM allows for \$50.00 in emergency expenses per month, we compute the appellant's monthly expenses as \$2,567.00. See *Fusco*, 42 M.S.P.R. at 508. Accordingly, we find that the appellant has a negative monthly balance of \$21.62.

In *Fusco*, the Board found that a consideration of assets should be limited to an individual's liquid assets, unless his nonliquid assets were so substantial that they offended the conscience. *Id.* at 505 n.4. Liquid assets under the *Policy Guidelines* are defined as cash or an asset that is readily convertible into cash with little or no loss of value. *Policy Guidelines* § I.D.5. at 7. The appellant's assets consist of \$2,900.00 in cash; \$43,300.00 in mutual funds; \$35,000.00 in partnerships; \$71,000.00 in insurance; and a trust of \$10,000.00. See IAF, Tab 4, Subtab 3.

Under the *Policy Guidelines*, the appellant's cash and mutual funds are considered liquid assets. *Policy Guidelines*

§ I.D.6. at 9. However, there is no indication that the appellant's partnerships, insurance, and his trust are readily convertible into cash with little or no loss of value. Accordingly, we find that those \$116,000.00 in assets are not liquid assets available for recovery of the overpayment, and that the administrative judge erred in determining that a "considerable amount" of the appellant's assets were liquid assets. See Initial Decision at 6. Furthermore, we find that the appellant's \$116,000.00 in nonliquid assets are not so substantial that they offend the conscience and should be made available for recovery. See *Fusco*, 42 M.S.P.R. at 505 n.4.

We find that the appellant's liquid assets, computing his \$43,300.00 in mutual funds and his "cash on hand" amounting to \$2,900.00, total \$46,200.00. See IAF, Tab 4, Subtab 3; *Policy Guidelines* § I.D.5. at 7. However, because \$5,000.00 of this amount is generally considered as unavailable for recovery as an emergency fund, we compute the appellant's liquid assets available for recovery as \$41,200.00. See *Fusco*, 42 M.S.P.R. at 506.

Although the appellant needs all of his current income to meet his current ordinary and necessary living expenses, based on the negative monthly balance of \$21.62 between his monthly income and expenses, there is no evidence that he needs substantially all of his \$41,200.00 in liquid assets to meet his current ordinary and necessary living expenses. See *Fusco*, 42 M.S.P.R. at 508. We note that, under the *Policy Guidelines*, a finding of financial hardship "may not be

warranted despite a zero or negative monthly income/expense margin" when there is a large amount of available liquid assets. *Policy Guidelines* § I.D.9. at 9.

Upon considering the appellant's overall financial condition, including the large amount of the appellant's liquid assets available for recovery, which exceed substantially the amount of the overpayment, and his right to make a mid-collection request to OPM for lower payments, compromise, suspension, or write-off in the event of a future medical emergency, we find that a waiver of the overpayment is not warranted in this appeal. We therefore reverse the initial decision's waiver of the overpayment. See *Johnson v. Office of Personnel Management*, 47 M.S.P.R. 174, 177 (1991) (the Board found that the annuitant who had a monthly income/expense margin of \$128.00 and \$3,000.00 in liquid assets would not suffer financial hardship repaying his debt of \$6,692.40 over a 6-year period).

#### ORDER

Accordingly, we AFFIRM OPM'S reconsideration decision finding that the appellant will not suffer financial hardship from the collection of the overpayment. This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See

5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.